82-1707

IN THE
SUPREME COURT OF THE UNITED STATES

NO.

RICHARD J. ORLOSKI,

Petitioner

vs.

HONORABLE DAVID E. MELLENBERG,
Judge, Court of Common Pleas,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF PENNSYLVANIA

Thomas J. Calnan, Jr.
Counsel for Petitioner
CALNAN & ORLOSKI, P.C.
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I. WHETHER OR NOT THE FINDING WITHOUT A HEARING OF DIRECT CRIMINAL CONTEMPT OF COURT FOR FAILURE TO APPEAR TIMELY AT A PRE-TRIAL CONFERENCE IS A DENIAL OF DUE PROCESS OF LAW GUARANTEED BY THE FOURTEENTH AMENDMENT WHERE THE TARDINESS RESULTED FROM OVERSIGHT CAUSED BY INVOLVEMENT IN OTHER COURT BUSINESS?

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I. WHETHER OR NOT THE FINDING WITHOUT HEARING OF DIRECT CRIMINAL CONTEMPT OF COURT FOR FAILURE TO APPEAR TIMELY AT A PRE-TRIAL CONFERENCE IS A DENIAL OF DUE PROCESS OF LAW GUARANTEED BY THE FOURTEENTH AMENDMENT WHERE THE TARDINESS RESULTED FROM OVERSIGHT CAUSED BY INVOLVEMENT IN OTHER COURT BUSINESS?

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(a) QUESTION PRESENTED FOR REVIEW

I. WHETHER OR NOT THE FINDING WITHOUT A HEARING OF DIRECT CRIMINAL CONTEMPT OF COURT FOR FAILURE TO APPEAR TIMELY AT A PRE-TRIAL CONFERENCE IS A DENIAL OF DUE PROCESS OF LAW GUARANTEED BY THE FOURTEENTH AMENDMENT WHERE THE TARDINESS RESULTED FROM OVERSIGHT CAUSED BY INVOLVEMENT IN OTHER COURT BUSINESS?

(b) LIST OF PARTIES

Petitioner:

Richard J. Orloski, represented by

Thomas J. Calnan, Jr. of Calnan & Orloski, P.C.

Respondents:

Honorable David E. Mellenberg, represented by Howland W. Abramson

Kevin J. Walakovits, represented by

William G. Ross, of Sigmon & Ross.

(c) TABLE OF AUTHORITIES

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(d) OFFICIAL & UNOFFICIAL REPORTS

Medve v. Walakovits (Appeal of Orloski), 39 Leh.L.J. 281, affirmed _____Pa.Sup._____, _____A.2d _____(1982).

(e) STATEMENT OF JURISDICTION

The final judgment of the Supreme Court of Pennsylvania denying leave to appeal was rendered and then entered on February 17, 1983, and the Petition For Writ Of Certiorari is timely filed within ninety (90) days thereof. The jurisdiction of this Court rests upon Rule 20.4 of the Rules of the Supreme Court, and 28 U.S.C. §2101(c).

(f) CONSTITUTIONAL & STATUTORY PROVISIONS

"...nor shall any State deprive any person of life, liberty or property, without due process of law..."

Fourteenth Amendment to the U.S. Constitution

"CLASSIFICATION OF PENAL CONTEMPT
The power of the several courts of this Commonwealth to issue attachments and to inflict summary punishments for contempt of court shall be restricted to the following cases.

* * *

(2) Disobedience or neglect by officers, parties, jurors or witnesses of or to the lawful process of the court."

42 Pa. C.S.A. §4131(2)

(g) STATEMENT OF THE CASE

The Petitioner, Richard J. Orloski, was counsel of record for Plaintiff in Medve v. Walakovits No. 80-C-1431. He is a graduate of King's College, Wilkes-Barre, Pennsylvania and Cornell Law School, Ithaca, New York. Petitioner is admitted to the practice of law in Pennsylvania and Michigan. Additionally, he is a member of the Bar of this Honorable Court, United States Court of Appeals, Third Circuit, and the United States District Court for the Eastern and Middle Districts. Specifically, it is the case Black v. Stevens No. 77-1934 in the United States District Court for the Eastern District of Pennsylvania, the Honorable Daniel J. Huyett found that Richard J. Orloski is

"an active practioner in Federal Court..." and the Judge found that Richard J. Orloski's work was consistently "excellent and of high quality." He further noted that his work was "...of a high quality, responsive, timely and accurate, and oft times, persuasive."

Petitioner has served as a Law Clerk to the Michigan Court of Appeals, as a Deputy Attorney General for the Commonwealth of Pennsylvania, and as an Assistant District Attorney of Lehigh County, Pennsylvania. On May 19, 1981, he was associated in the private practice of law with Stamberg, Caplan and Calnan, but was in the process of joining a new firm, Calnan & Orloski, a Professional Corporation.

On May 19, 1981, Petitioner was scheduled to appear before the Honorable David E. Mellenberg at 10:15 A.M. for a pre-trial settlement conference in Medve v. Walakovits, supra. The initiative for placing the matter on the pre-trial conference list came from Petitioner by virtue of his Certificate of

Readiness dated September 5, 1980. The Medve case involved a claim by Plaintiff for personal injuries which resulted from an automobile accident caused by a drunk driver.

In the professional judgment of Petitioner, the case was an excellent one for a jury trial in that he believed that he could prove without a doubt that the Defendant was intoxicated while driving, and that this caused Plaintiff's injuries. Prior to the settlement conference, the parties were at an impasse of $35,000.00 demand/$7,500.00 offer, and Petitioner was anxious to attend the pre-trial settlement conference so that the matter could proceed to trial.

According to the diary of Petitioner, he had only two matters scheduled for May 19, 1981: 1) a juvenile conference in the Courthouse at 9:30 A.M.; and 2) the pre-trial settlement conference in Medve at 10:15 A.M. Prior to arriving at the courthouse, Petitioner and his wife voted, since Tuesday, May 19, 1981 was primary election day. Thereafter, he proceeded

directly to his office. Petitioner arrived at his office at approximately 9:15 A.M. where he met his clients, and proceeded directly to the courthouse.

Petitioner timely arrived at the juvenile pre-hearing conference at 9:30 A.M. before Probation Officer Gary Delong. After the conference in the Juvenile Probation Office, Petitioner proceeded with his clients to the front entrance of the courthouse where he advised his clients the next steps involved in the juvenile procedure, and they departed while he remained inside the courthouse. Although he did not check the time after the conference, his best estimate is that the conference concluded, and his clients departed between 10:00 A.M. and 10:05 A.M.

Immediately thereafter, while Petitioner was still in the front corridor of the courthouse, he met W. Hamlin Neely, Esquire, who was representing Plaintiff in the case of Schwenk v. Oakes & Dierolf No. 80-C-1007, in which Petitioner was representing the Defen-

dants. The case of Schwenk v. Oakes & Dierolf was scheduled for a pre-trial conference on Friday, May 22, 1981 before the Honorable Maxwell Davison at 10:30 A.M., and there was some question about whether or not it was properly on the jury trial list. Petitioner and W. Hamlin Neely, Esquire, agreed that the case should be stricken from the jury trial list and be placed on the arbitration list. Rather than delay Judge Davison on Schwenk v. Oakes & Dierolf, Petitioner suggested that he and Mr. Neely go immediately to the Court Administrator's office and have it stricken from the list.

Petitioner and Mr. Neely arrived at the Court Administrator's Office, but when they arrived, neither the Court Administrator, Daniel Sabetti, nor the Deputy Court Administrator, Susan Schellenberg, were present. The secretary in the Court Administrator's Office indicated that they would have to wait for the Administrator or his Deputy, which they did. According to his recollection, the Deputy Court Administrator arrived shortly thereafter, and counsel then

arranged for the Schwenk v. Oakes & Dierolf case to be stricken from the list.

The Court Administrator's Office is located on the fourth floor of the courthouse. From there, Petitioner immediately proceeded down the stairwell in order to pick up his file at his law office in the Medve case.

While Petitioner was proceeding downstairs somewhere in the first floor area, he glanced at his watch and noticed that it was approximately 10:25 A.M., and that he was running late for the Medve pre-trial settlement conference. As soon as he noticed that he was late, Petitioner immediately reversed positions, and ran--not walked--up five flights of stairs to the room where Judge Mellenberg was holding settlement conferences. When Petitioner arrived at the fifth floor, he opened the door and saw William Ross, Esquire, Counsel for the Defendant, outside the conference room talking with another lawyer who was unknown to him. His subsequent investigation has revealed that this unknown lawyer

was R. March, Esquire, who was waiting for the 10:45 A.M. settlement conference.

When Petitioner arrived at the fifth floor, he was out of breath, and he walked past William Ross, Esquire, without interrupting his conversation. He immediately proceeded to sit down on a chair in the corridor where, by happchance, a newspaper was strewn about. He picked up the newspaper, straightened it out, and then began reading the financial page. As he was reading the financial page, he could see directly in front of him about ten yards away, William Ross, Esquire, who was still talking to R. March, Esquire.

At some point, Petitioner noticed that William Ross, Esquire, counsel for the Defendant, was heading toward the exit. When he noticed William Ross, Esquire, Petitioner called to him and asked if he--or someone else--was going to be handling the Medve pre-trial conference. It was then that Petitioner learned for the first time--about 10:35 A.M.--that the Medve case was stricken.

When Petitioner called to William Ross, Esquire, Ross stopped, told him that he had already missed the settlement conference, and then Petitioner and Ross proceeded into the Judge's conference room. When he walked into the pre-trial conference room, Petitioner observed William Ross's law partner, Jackson Sigmon, Esquire, sitting there alone with the Honorable David E. Mellenberg, and his court reporter, Nellie Zweifel. When Petitioner arrived inside, the 10:30 A.M. pre-trial conference had not yet begun, and as fate would have it, it would be cancelled for the failure of Plaintiff's counsel, John Segata, Jr., Esquire, to appear.

When Petitioner arrived inside, he apologized to the Court for his tardiness, advised the Court that he lost track of time because he was working on another matter in the Court Administrator's Office, and advised the Court that he would do whatever the Court wished, i.e., proceed with the settlement conference since everyone was there, or proceed to get

it relisted. Judge Mellenberg then told him that Mr. Sigmon advised him that, in Northampton County, lawyers are held in contempt for their absences, that he had planned to hold him in contempt for not coming, but since he appeared with an explanation, he would not hold him in contempt.

Judge Mellenberg further advised Petitioner that he would not hold the settlement conference because of his tardiness, and that he was striking the case from the trial list commencing Tuesday, May 26, 1981.

Petitioner accepted Judge Mellenberg's decision to strike the case from the list without complaint, and then proceeded back down to the Court Administrator's Office to get the case relisted. Petitioner then proceeded back to his office where he confirmed, in writing, the fact that the case was stricken, and that the case had to be re-listed. See, copy of letter of May 19, 1981 to Daniel Sabetti, Esquire, with copies to the Honorable David E. Mellenberg, William Ross, Esquire, and Peter Medve.

attached as Exhibit C to Statement In Absence of Transcript. The reason for the prompt notice to the Court Administrator was because Petitioner was anxious to get the case through the pre-trial settlement conference and then to trial. Petitioner never intentionally failed to appear at the pre-trial settlement conference which he wanted. Instead, because he was conducting other court business, Petitioner lost track of time and appeared late for the pre-trial settlement conference. His lateness was compounded by the fact that he mistakenly assumed that the pre-trial list was running late when he arrived at about 10:25 A.M. and saw William Ross, Esquire, outside the conference room conversing with R. March, Esquire. If Petitioner had realized that the case was already stricken, he would not have sat down to wait for his turn, and instead, he would have immediately proceeded to the pre-trial conference room.

Sometime in the afternoon on May 20, 1981, Petitioner received a telephone call from

Gary Mantz, a newspaper reporter for the Allentown Call-Chronicle, who advised him that the court was holding him in contempt of court for his tardiness. On Friday, May 22, 1981, Petitioner met with Judge Mellenberg who showed him the Order which he had signed holding Petitioner in contempt of court for his failure to appear.

Petitioner filed a Notice of Appeal from the Order of May 19, 1981. Thereafter, Petitioner filed under oath a Statement In Absence Of Transcript Pursuant to Rule 1923 of Pa. R.C.P. Judge Mellenberg filed a Counter-statement in response to Petitioner's statement.

On October 1, 1982, the Superior Court of Pennsylvania affirmed the finding of Contempt without a hearing under the exceptions at 42 Pa.C.S.A. §4131 as one of direct criminal contempt without a hearing. Petitioner then timely sought permission to file an appeal with the Supreme Court of Pennsylvania. On February 17, 1983, the Supreme Court of Pennsylvania denied

the Petition for Allowance of Appeal. The matter is now before this Court on Petitioner's Petition For Writ of Certiorari to this Honorable Court.

(h) RAISING FEDERAL ISSUE BELOW

In Appellant's Statement Of Issues, attached to the Notice of Appeal, Petitioner wrote as follows:

> I. WHETHER OR NOT THE ORDER OF MAY 19, 1981 SUMMARILY HOLDING AN ATTORNEY IN CONTEMPT OF COURT WITHOUT NOTICE TO THE ATTORNEY OR WITHOUT ANY OPPORTUNITY TO PRESENT A DEFENSE IS A DENIAL OF DUE PROCESS OF LAW GUARANTEED BY THE DUE PROCESS CLAUSE OF THE PENNSYLVANIA AND UNITED STATES CONSTITUTIONS?

In response to the Statement of Issues, the trial court wrote a Memorandum Opinion dated July 10, 1981 that, under 42 Pa.C.S.A. §4131, supra, the Court has the authority to summarily impose a penalty for criminal contempt of court. The Superior Court of Pennsylvania affirmed the summary punishment for direct criminal contempt of court relying again on 42 Pa.C.S.A. §4131. The matter was never reviewed by the Supreme Court of Pennsylvania which refused to grant the Petition For Allowance Of Appeal.

(i) ARGUMENT

I. WHETHER OR NOT THE FINDING WITHOUT A HEARING OF DIRECT CRIMINAL CONTEMPT OF COURT FOR FAILURE TO APPEAR TIMELY AT A PRE-TRIAL CONFERENCE IS A DENIAL OF DUE PROCESS OF LAW GUARANTEED BY THE FOURTEENTH AMENDMENT WHERE THE TARDINESS RESULTED FROM OVERSIGHT CAUSED BY INVOLVEMENT IN OTHER COURT BUSINESS?

1. The Petitioner is a respected member of the bar. The Petitioner is a graduate of Cornell Law School and is admitted to the practice of law in Pennsylvania and Michigan. He is a member of the bar of this Court, and the United States Court of Appeals, Third Circuit, and the United States District Court for the Eastern and Middle Districts of Pennsylvania. In the case of Black v. Stephens, et al., No. 77-1834, in the United States District Court for the Eastern District of Pennsylvania, the Honorable Daniel J. Huyett commented on Petitioner's reputation in the legal community prior to awarding attorney's fees after a successful verdict in a civil rights action where Petitioner was counsel. On January 21, 1982, the Honorable Daniel J. Huyett observed as follows:

> "I have taken into account Mr. Orloski's reputation in civil litigation as well as the quality of his work which in this case has been consistently excellent and of high quality... May I say that I have had Mr. Orloski in other cases. He is an active practitioner in the Federal court and at all times, I have found his work of a very high quality, and certainly that was true in this case.
>
> * * *
>
> The work of Plaintiff's trial counsel was excellent. Mr. Orloski's pleadings were of a high quality, responsive, timely and accurate, and oft times, persuasive."

In addition to being an active practitioner, Petitioner is the author of a book entitled "Criminal Law: An Indictment" (Nelson-Hall, Chicago, 1976), and two law review articles: "Religious Discrimination In Selection Of Trustees: The Nexus Test Of Coleman Foundation" 36 Un. of Pitt. L.R. 325 (1974); and "The Civil War Amendments" 49 St. John's L.R. 493 (1975). Hence, on the record before this Court, the only question is whether or not an attorney who loses track of time and is accidentally late for a pre-trial conference because of involvement

with other court business, can be subjected to summary punishment for direct criminal contempt without a hearing or an opportunity to be heard.

2. Due Process means notice of the charges and the right to be heard. As early as 1868, this Honorable Court went on record holding that an attorney could not, consistent with Due Process of Law, be found in criminal contempt of the court without notice of the charges and an opportunity to be heard. Ex parte Bradley 7 Wall. 364, 19 L.Ed 214 (1968). Again, in Holt v. Virginia 381 U.S. 131 136, 85 S.Ct. 1375, 14 L.Ed.2d 290 (1965), this Court reversed and discharged a finding of direct criminal contempt holding that "...it is settled that due process and the Sixth Amendment guarantee a defendant charged with contempt such as this 'an opportunity to be heard in his own defense--a right to his day in court--...and to be represented by counsel.' In re Oliver 333 U.S. 257, 273." See, also, Johnson v. Mississippi 403 U.S. 212, 91 S.Ct. 1778, 29

L.Ed.2d 423 (1971). Specifically, this Court has held that summary punishment for contempt without notice and without an opportunity to be heard is inconsistent with the constitutional obligation imposed by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Taylor v. Hayes 418 U.S. 488, 94 S.Ct. 2697, 41 L.Ed.2d 897 (1974); Groppi v. Leslie 404 U.S. 496, 92 S. Ct. 582, 30 L.Ed.2d 632 (1971).

3. Summary punishment in contempt is only permissible where contempt occurs in the court's presence, and involves "exceptional circumstances". As observed by this Court in Harris v. United States 382 U.S. 162, 86 S. Ct. 352, 15 L.Ed.2d 240 (1965), the power to punish summarily even direct contemptuous behavior is reserved for exceptional circumstances, such as, threatening the judge or disrupting a hearing, where speedy punishment may be necessary to achieve vindication of the court's dignity and authority. See, Cooke v. United States 267 U.S. 517, 45 S.Ct.

Ct. 390, 69 L.Ed 767 (1922), and Ex parte Terry, 128 U.S. 289, 9 S.Ct. 77, 32 L.Ed 405 (1888). Absent such exceptional circumstances and the need for swiftness, even contemptuous behavior in the actual presence of the court cannot be punished summarily. Harris v. United States, supra.

4. A summary finding of contempt without notice of the charges and the opportunity to be heard was constitutionally infirm. On May 19, 1981, the Honorable David Mellenberg found the Petitioner in contempt of court. After Petitioner filed an appeal to the Superior Court of Pennsylvania that he was challenging the finding made in absentia, the trial court attempted to justify the imposition of summary punishment without notice of the charges and without an opportunity to be heard as justified for "...smooth administration of a sophisticated and crowded court calendar..." In order to give the appellate tribunals an insight into the reason for his tardiness, Petitioner filed a Statement In Absence Of Transcript Pursuant To

Rule 1923 of Pa. R.A.P. wherein he detailed the fact that he was involved in other court business at the time of the pre-trial conference, and that he inadvertently lost track of time. Given the benefit of these facts, the Superior Court of Pennsylvania noted that "...Orloski also lacks the deliberate, conscious decision to be late..." Despite this finding, the Superior Court of Pennsylvania affirmed the procedure--and the finding of contempt--as a necessary ingredient to the "...efficient operation of their court calendar."

It is not contested that the court's have inherent powers to establish rules of procedure governing the administration of this case book, and may adopt procedures involving fines for non-appearance, or tardiness. That, however, was not done here.

The lower court labeled as "contemptuous" Petitioner's failure to appear on time, and justified its finding by branding it "direct criminal contempt." The Superior Court of

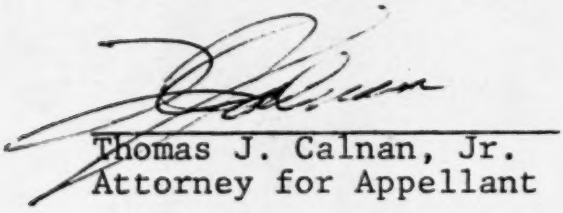
Pennsylvania found the element of intentional disobedience lacking, but affirmed the finding of direct criminal contempt by noting that involvement in other court business can be characterized as recklessness for the purpose of inferring the necessary element of conscious to justify a finding of intentional misbehavior. Yet the procedure used in reaching this result remains constitutionally inform. The Petitioner was never given notice of the charges, nor an opportunity to be heard. His tardiness, though now explained, has been labeled contemptuous, and rationalized as direct criminal contempt. The trial judge notes that he imposed a "nominal fine". That, however, is not the issue. If not reversed, the Petitioner must bear the weight of a finding of direct criminal contempt of court for the remainder of his professional career. For a lawyer who has dedicated his life to litigation, and respect for the orderly process of law, the finding of direct criminal contempt is a stigma in an otherwise unblemished professional career. A father who is behind on his child support payments is given notice

of the charges, and an opportunity to defend. If the court finds disobedience to the court ordered support, the man is given the opportunity to purge himself of contempt by making a payment towards the arrearages. The Petitioner in the case at bar has not been given the niceties of procedural due process. Payment of the "nominal fine" will not purge the Petitioner of the finding of contempt, ubut is merely acceptance of the "punishment" imposed by the court. The stigma of intentionally--or recklessly--violating an order of court because of explained tardiness will survive the payment of the fine. Hence, the imposition of this sentence must be carefully scrutinized. When such a review is made, it is obvious that the requirements of notice of the charges and an opportunity to be heard were wholly wanting. As such, the procedures employed were in violation of the Due Process requirements of the Fourteenth Amendment.

(j) CONCLUSION

For the foregoing reasons, the Petition For Writ Of Certiorari ought to be granted.

CALNAN & ORLOSKI, P.C.



Thomas J. Calnan, Jr.
Attorney for Appellant

IN THE COURT OF COMMON PLEAS OF LEHIGH CO.,PA.
CIVIL DIVISION

PETER J. MEDVE,)
Plaintiff) NO. 80-C-1431
vs.)
KEVIN J. WALAKOVITS,)
Defendant.)

PRE-TRIAL SETTLEMENT CONFERENCE

ORDER

At a settlement conference scheduled May 19, 1981 at 10:15 A.M. at which Richard Orloski, Esquire, counsel for plaintiff failed to appear, and at which William G. Ross, Esquire, counsel for defendant appeared as scheduled, the Court having determined that such non-appearance is in contempt of Court,

IT IS ORDERED that Richard Orloski shall pay the sum of $50.00 to William G. Ross, Esquire, counsel for the defendant who appeared as scheduled. That the Court shall be notified of compliance with this order immediately.

IT IS FURTHER ORDERED that the within matter be stricken from the trial list and

shall not be rescheduled for trial until such time as an effective settlement conference can be held.

BY THE COURT:

/S/ DAVID E. MELLENBERG
DAVID E. MELLENBERG, JUDGE

IN THE COURT OF COMMON PLEAS OF LEHIGH CO.,PA.

PETER J. MEDVE, Plaintiff	:	NO. 80-C-1431
vs.	:	
KEVIN J. WALAKOVITS, Defendant	:	SUPERIOR COURT
(APPEAL OF RICHARD J. ORLOSKI Counsel for Plaintiff from Contempt Of Court Order)	:	NO. 1383, Phila. 1981

STATEMENT IN ABSENCE OF TRANSCRIPT
PURSUANT TO RULE 1923 OF PA. R.A.P.

COMMONWEALTH OF PENNSYLVANIA)
) SS:
COUNTY OF LEHIGH)

I, RICHARD J. ORLOSKI, being duly sworn according to law, depose and say as follows:

1. I was counsel of record for Plaintiff in Medve v. Walakovits No. 80-C-1431.

2. I am a graduate of King's College, Wilkes-Barre, Pennsylvania, and Cornell Law School, Ithaca, New York.

3. I am admitted to the practice of law in Pennsylvania and Michigan, and, in addition, I am a member of the Bar of the Supreme Court of the United States; United States Court of Appeals, Third Circuit; and the United States District Court for the Eastern and Middle Districts.

4. I have served as a Law Clerk to the Michigan Court of Appeals, as a Deputy Attorney General for the Commonwealth of Pennsylvania, and as an Assistant District Attorney of Lehigh County, Pennsylvania.

5. On May 19, 1981, I was associated in the private practice of law with Stamberg, Caplan and Calnan, but was in the process of joining a new firm, Calnan & Orloski, A Professional Corporation.

6. On May 19, 1981, I was scheduled to appear before the Honorable David E. Mellenberg at 10:15 A.M. for a pre-trial settlement conference in Medve v. Walakovits supra. See, copy of Pre-Trial Settlement Conference list attached hereto as Exhibit A. Said copy was supplied to me by the Court Administrator's Office, and the handwritten notations thereon were made by court personnel.

7. The initiative for placing the matter on the pre-trial conference list came from

me by virtue of my Certificate of Readiness dated September 5, 1980 which is attached hereto as Exhibit B.

8. The Medve case involved a claim by Plaintiff for personal injuries which resulted from an automobile accident caused by a drunk driver.

9. In my professional judgment, the case was an excellent one for a jury trial in that I believed that I could prove without a doubt that the Defendant was intoxicated while driving, and this caused Plaintiff's injuries.

10. Prior to the settlement conference, the parties were at an impasse of $35,000.00 demand/$7,500.00 offer, and I was anxious to attend the pre-trial settlement conference so that the matter could proceed to trial.

11. According to my diary, I had only two matters scheduled for May 19, 1981: 1) a juvenile conference in the Courthouse at 9:30 A.M. and 2) the pre-trial settlement conference in Medve at 10:15 A.M.

12. Prior to arriving at the Courthouse, my wife and I voted since Tuesday, May 19, 1981 was primary election day, and then I went directly to my office.

13. I arrived at my office at approximately 9:15 A.M. where I met my clients, and proceeded directly to the Courthouse.

14. I timely arrived at the juvenile pre-hearing conference at 9:30 A.M. before Probation Officer Gary DeLong.

15. After the conference in the Juvenile Probation Office, I proceeded with my clients to the front entrance of the Courthouse where I advised them the next steps involved in the juvenile procedure, and they departed while I remained inside the Courthouse. Although I did not check the time after the conference, my best estimate is that the conference concluded, and my clients departed between 10:00 A.M. and 10:05 A.M.

16. Immediately thereafter, while I was still in the front corridor of the Courthouse, I met W. Hamlin Neely, Esquire, who was representing Plaintiff in the case of Schwenk v. Oakes & Dierolf No. 80-C-1007 while I was representing the Defendants.

17. The case of Schwenk v. Oakes & Dierolf was scheduled for a pre-trial conference on Friday, May 22, 1981 before the Honorable Maxwell Davison at 10:30 A.M., and there was some question about whether or not it was properly on the jury trial list.

18. W. Hamlin Neely, Esquire, and I agreed that the case should be stricken from the jury trial list and be placed on the arbitration list.

19. Rather than delay Judge Davison on Schwenk v. Oakes & Dierolf, I suggested that Mr. Neely and I go immediately to the Court Administrator's Office and have it stricken from the list.

20. Mr. Neely and I arrived at the Court Administrator's Office, but when we arrived, neither the Court Administrator Daniel Sabetti, nor the Deputy Court Administrator Susan Schellenberg were present.

21. The secretary in the Court Administrator's Office indicated that we would have to wait for the Administrator or his Deputy, which we did.

22. According to my recollection, the Deputy Court Administrator arrived shortly thereafter, and we then arranged for the Schwenk v. Oakes & Dierolf case to be stricken from the list.

23. The Court Administrator's Office is located on the Fourth Floor, and I then proceeded down the stairwell in order to pick up my file at my law office in the Medve case.

24. While I was proceeding downstairs somewhere in the first floor area, I glanced at my watch and noticed that it was

approximately 10:25 A.M., and that I was running late for the Medve pre-trial settlement conference.

25. As soon as I noticed that I was late, I immediately reversed positions, and ran--not walked--up five flights of stairs to the room where Judge Mellenberg was holding settlement conferences.

26. When I arrived at the fifth floor, I opened the door and saw William Ross, Esquire, counsel for the Defendant, outside the conference room talking with another lawyer who was then unknown to me.

27. My subsequent investigation has revealed that this unknown lawyer was R. March, Esquire, who was waiting for the 10:45 A.M. settlement conference.

28. When I arrived at the fifth floor, I was out of breath, and I walked past William Ross, Esquire, without interrupting his conversation.

29. I immediately proceeded to sit down on a chair in the corridor where, by happchance, a newspaper was strewn about.

30. I picked up the newspaper, straightened it out, and then began reading the financial page.

31. As I was reading the financial page, I could see directly in front of me about ten yards away, William Ross, Esquire, who was still talking to R. March, Esquire.

32. At some point, I noticed that William Ross, Esquire, counsel for the Defendant, was heading toward the exit.

33. When I noticed William Ross, Esquire, I called to him and asked if he--or someone else--was going to be handling the Medve pre-trial conference.

34. It was then that I learned for the first time--about 10:35 A.M.--that the Medve case was stricken.

35. When I called to William Ross, Esquire, he stopped, told me that I had already missed the settlement conference, and

then he and I proceeded into the judge's conference room.

36. When I walked into the pre-trial conference room, I observed William Ross's ;aw partner, Jackson Sigmon, Esquire sitting there alone with the Honorable David E. Mellenberg, and his court reporter, Nellie Zweifel.

37. When I arrived inside, the 10:30 A.M. pre-trial conference had not yet begun, and as fate would have it, it would be cancelled for the failure of Plaintiff's counsel, John Segata, Jr., Esquire, to appear.

38. When I arrived inside, I apologized to the court for my tardiness, advised the court that I lost track of time because I was working on another matter in the Court Administrator's Office, and advised the court that I would do whatever the court wished, i.e., proceed with the settlement conference since everyone was there, or proceed to get it relisted.

39. The judge then told me that Mr. Sigmon advised him that, in Northampton County, lawyers are held in contempt for their absences, that he had planned to hold me in contempt for not coming, but since I appeared with an explanation, he would not hold me in contempt.

40. Judge Mellenberg further advised me that he would not hold the settlement conference because I was late, and that he was striking it from the trial list commencing Tuesday, May 26, 1981.

41. I accepted Judge Mellenberg's decision to strike the case from the list without complaint, and then proceeded back down to the Court Administrator's Office to get the case re-listed.

42. I proceeded back to my office where I confirmed, in writing, the fact that the case was stricken, and that the case had to be re-listed. See, copy of letter of May 19, 1981 to Daniel Sabetti, Esquire, with copies to the Honorable David Mellenberg, William

Ross and Peter Medve, attached hereto as Exhibit C.

43. The reason for my prompt notice to the Court Administrator was because I was anxious to get the case through the pre-trial settlement conference and then to trial.

44. I never intentionally failed to appear at the pre-trial settlement conference which I wanted, but rather because I was conducting other court business, I lost track of time and appeared late for the pre-trial settlement conference.

45. My lateness was compounded by the fact that I mistakenly assumed that the pre-trial list was running late when I arrived at about 10:25 A.M. and saw William Ross, Esquire outside the conference room conversing with R. March, Esquire. If I had realized that the case was already stricken, I would not have sat down to wait for my turn, and I would have immediately proceeded to the pre-trial conference room.

46. Sometime in the afternoon on May 20,

1981, I received a telephone call from Gary Mantz, a newspaper reporter for the Allentown Call-Chronicle, who advised me that the court was holding me in contempt of court for my tardiness.

47. On Friday, May 22, 1981, I met with Judge Mellenberg who showed me the Order which he had signed holding me in contempt of court for my failure to appear.

/S/ Richard J. Orloski
RICHARD J. ORLOSKI

SWORN TO and Subscribed
before me this 5th day
if August, 1981.

/S/ Loretta Johnson
Notary Public

Notary Seal

COURT OF COMMON PLEAS OF LEHIGH COUNTY
CIVIL ACTION - LAW

PETER J. MEDVE,)
Plaintiff) NO. 81-C-1431
vs.)
KEVIN J. WALAKOVITS,)
Defendant)

FILED
JUL 10, 2:47 PM '81
CLERK OF COURTS
CIVIL, LEHIGH
COUNTY

(APPEAL OF RICHARD J. ORLOSKI, Counsel for Plaintiff from Contempt Of Court Order)

* * *

APPEARANCES:
Stuart T. Shmookler, Esquire, on Behalf of Appellant, Richard J. Orloski

* * *

DAVID E. MELLENBERG, Judge.

This Court held Appellant, Richard J. Orloski, Esquire, on May 19, 1981, in contempt, and imposed a nominal fine for failing to appear at a pre-trial settlement conference scheduled in the above-captioned matter in which he is counsel of record for the plaintiff. Appellant is an officer of this court with offices in Allentown, Lehigh County, Pennsylvania. Appellant's appeal to the Superior Court from the contempt order necessitates this

Memorandum Opinion[1].

Appellant was scheduled to attend a pre-trial settlement conference at 10:15 A.M. on May 19, 1981; one of 18 such conferences scheduled at fifteen minute intervals.

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[1]The Court is aware that when the summary contempt power is exercised, a summary opportunity to adduce evidence is customary, Commonwealth v. Stevenson 482 Pa.Super.Ct. 76, 393 A.2d 386 (1978), and that the Court may reconsider a contempt order upon petition by the appellant, Pa.R.A.P. 1701(c); however, appellant chose to directly appeal to the Superior Court citing certain facts in his statement of the issues. The Rules of Appellant Procedure do not provide for the court to sua sponte grant a reconsideration hearing.

Opposing counsel, William Ross, Esquire, was in attendance at the appointed time. Appellant failed to arrive at the scheduled time and had not informed the Court beforehand of any difficulty that would affect his attendance at the scheduled conference. The Court held the appellant in contempt and ordered that he pay a Fifty-Dollar ($50.00) fine to opposing counsel.

With Attorney Jackson Sigmon present for the next scheduled conference at 10:30 A.M., the appellant appeared, and indicated to the Court that he had been in the Court Administrator's Office arranging with counsel in another case to have that case stricken from the pretrial list. In response, the Court indicated that it might vacate the contempt order already issued after having an opportunity to consider appellant's explanation. Upon reflection of the explanation submitted by appellant, the Court

refused to vacate the order.[2]

Appellant argues in support of his appeal that his conduct was not contemptuous and that in any case, summary imposition of a fine by the court is improper as a violation of due process. Appellant's due process argument assumes that the nature of appellant's contempt is civil; however, there is nothing inherent in a contemptuous act or refusal to act which classifies that act as "criminal" or "civil". Commonwealth v. Strickler 481 Pa. 579, 393 A.2d 313 (1978). The distinguishing characteristic between contempts is the dominant purpose for which the court holds the individual in contempt. Commonwealth v. Charlette, 481 Pa.Super.Ct. 22, 391 A.2d 1296 (1978); Commonwealth Acting by Kane v. Flick, 33 Pa. Commw. Ct. 553, 382 A.2d 762 (1978).

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[2]The pre-trial settlement conference at 10:30 A.M. which followed appellant's scheduled conference, resulted in a similar contempt order being issued to another attorney for failing to appear as scheduled.

When the dominant purpose of the court is to punish the individual for disobedience which is an affront to the dignity and authority of the court, the contempt is criminal. Cahalin v. Goodman, ___Pa.Super.Ct.___ 421 A.2d 696 (1980). Where the conduct occurs in the presence of the court, the criminal contempt is direct; where the misconduct may have a more remote impact on the dignity of the court, the criminal contempt is indirect. Commonwealth f. Fladger 250 Pa.Super.Ct. 36, 378 A.2d 440 (1978).

The law has long recognized the need to provide the courts with power to impose summary punishment for such conduct in appropriate situations. Commonwealth v. Stevenson 482 Pa. 76, 393 A.2d 386 (1978). This recognition is based on the need for immediate penal vindication of the dignity of the court. Cooke v. United States 267 J.S. 517, 45 S.Ct. 390, 69 L.Ed 767 (1925). The power to punish for contempt is not derived from statute but inherent in the court, Stevenson, supra. However, the

legislature has sought to regulate the manner of the exercise of the power of summary contempt. Section 4131 of the Judicial Code[3] states that the power of the court to inflict summary punishments for contempt is restricted to the following cases:

> ...
>
> (2) to disobedience or neglect by officers of such courts respectively.

Sub-section II permits a court to summarily punish disobedience or neglect of its lawful process. In the matter of Johnson 467 Pa. 552 369 A.2d 739 (1976).

The Court recognizes that every failure to appear does not constitute contempt, and that intentional disobedience or neglect must be shown. Commonwealth v. Washington 466 Pa. 506, 353 A.2d 806 (1976). In Washington, an attorney who was late for trial on account of

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[3]1976, July 9, P.L. 586, No. 142, §2, eff. June 27, 1978, 42 Pa. C.S.A. 4131

oversleeping was found not to be in contempt because the necessary element of intent could not be shown. Unlike the factual situation in Washington, appellant here made a deliberate choice not to be present as ordered. Appellant asserts certain facts in his appeal which he argues provide a justification for his failure to appear. These facts are not pertinent even if true because appellant's failure to appear was intentional. Appellant was aware that he was scheduled for a conference at 10:15 A.M., and for reasons of his own, chose to conduct other court business which interfered with his attendance at the conference. It is not relevant that appellant was twelve to fifteen minutes late; it is relevant that as a result of his tardiness he missed the entire conference.

Appellant argues that his conduct does not come up to a level of behaviour that would constitute contempt. We disagree. In Commonwealth v. Marcone, 487 Pa. 572, 410 A.2d 759 (1980), the Pennsylvania Supreme Court

held that an attorney's failure to attend the call of the Criminal Trial List constituted contemptuous behavior which justified the court's use of summary punishment. The court's decision was based on the conclusion that calendar control of modern criminal court dockets is a sophisticated operation, dependent on diverse factors for which the court must have the authority to regulate. Conduct on the part of an attorney which disrupts the efficient administration of the criminal court calendar is an affront to the dignity of the court, and therefore, contemptuous.

The same is true of the Civil Court Calendar which is equally dependent on diverse factors which the court must have authority to regulate. Smooth administration of a sophisticated and crowded court calendar depends on each attorney's personal sense of responsibility to be where he is expected. In the instant case, appellant's deliberate

choice to conduct other non-mediate court related business[4] at the same time he was scheduled for a pre-trial settlement conference resulted in a waste of court time as well as the time of opposing counsel and his client, with potential further delay of the progress of the case which was the subject of the conference. Such conduct cannot be condoned. The Court therefore held the appellant in contempt and for the purpose of penalizing his intentional disobedience summarily imposed a penalty pursuant to 42 Pa.C.S.A. 4131, supra.

By the Court:

/S/ David E. Mellenberg
DAVID E. MELLENBERG J.

DATED: July 10, 1981

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[4]The court, in Marcone, supra, categorily rejects the excuse of a heavy work schedule as an excuse for failing to make a scheduled appearance, as does the Court in the instant case.

J. 451/82

PETER J. MEDVE	:	IN THE SUPERIOR COURT OF
vs.	:	PENNSYLVANIA
KEVIN J. WALAKOVITS	:	Philadelphia Office
Appeal of Richard J. Orloski	:	No. 1383 Philadelphia, 1981

Appeal from the Order of the Court of Common Pleas of Lehigh County, Civil Division, at No. 80-C-1431

BEFORE: SPAETH, BROSKY and BECK, JJ.

OPINION BY BROSKY, J. FILED OCT. 1, 1982

This is an appeal from an order holding an attorney in contempt of court. The event which precipitated the contempt order was counsel's late appearance at a pre-trial settlement conference. A novel issue of law is presented here: whether the element of intent necessary for a finding of contempt can be met by proof of recklessness. The trial court, in the person of Judge Mellenberg, did not address the case in precisely these terms. Nonetheless, we affirm the contempt order.

Appellant contends that his tardiness was the product of an oversight, rather than an intentional act; and that, therefore, he cannot

be properly held in contempt. In particular, he states that he "lost track of time". Such inadvertence is not, he argues, the equivalent of intent. Were these the only relevant facts in the case, we would agree. However, there are other elements in the chain of events which complicate the case for appellant.

Richard Orloski, plaintiff's counsel in Medve v. Walakovits, was scheduled to appear at 10:15 A.M. for a pre-trial settlement conference with Judge Mellenberg. According to Orloski's own sworn statement, he was in the front entrance of the courthouse "between 10:00 A.M. and 10:05 A.M." He relates that immediately after this he met another attorney in the corridor and that the decided to go up to the fourth floor to strike another case from the trial list. When they arrived, neither the Court Administrator nor his deputy were present. "The Secretary in the Court Administrator's office indicated that we would have to wait for the Administrator or his Deputy, which we did." (Statement in absence of transcript, Orloski, p. 4).

After the administrator returned and he completed his business, Orloski went down four flights of stairs to get his papers for the pre-trial conference. At this point, he discovered that the time was about 10:25.

Mr. Orloski states that he then ran up five flights of stairs to the floor where the conference was to be held. Having arrived on the fifth floor, he saw counsel for the defendant, Walakovits, in conversation in the hallway, assumed that the conference was running late and sat down to read a newspaper. When opposing counsel started to leave, at "about 10:35 A.M.," Orloski asked and found out that the pre-trial conference in his case had been called in his absence and that the case was stricken. Orloski then proceeded to the conference room where he tendered his apologies and explanation to the court.

A $50 fine, payable to opposing counsel, was imposed on appellant as a summary punishment for contempt of court. The power of a court to take such an action is limited to certain circumstances. In relevant part, they

are: "(2) Disobedience or neglect by officers, parties...to the lawful process of the court." 42 Pa.C.S.A. §4131.

Statutory phrases as general as this one must be given definitional parameters by the decision of the courts. This is especially appropriate when, as here, the area is within the inherent powers of the courts. Decisions in recent years have added greatly to the interpretive gloss in this particular category--that of summarily holding attorneys in contempt for non-appearance or tardiness at court proceedings. Noting the factual contexts of these cases will put Orloski's conduct in its legal perspective.

In 1976, the case of Commonwealth v. Washington 466 Pa. 506, 353 A.2d 806 (1976), established that the element of intent was a necessary adjunct to disobedience or neglect in order for contempt to be proven. The attorney in that case failed to appear in court and a county detective found him asleep at home.

"Appellant apologized to the court, and explained that he had gone to a party the night before and thought he had set his alarm." 466 Pa. at 507, 353 A.2d at 806-7. Justice Manderino found that intent could not be shown under these circumstances.

A year later, another case with the same name reversed a contempt order for failure to appear in court because the judge knew that the attorney was engaged in another court and because the record did not show that the attorney had been notified about that scheduled appearance. Here again, the lack of requisite intent decided the case. Commonwealth v. Washington 470 Pa. 199, 368 A.2d 263 (1977).

Neither of the Washington cases was very radical, once the element of intent was accepted. One could hardly have the intent not to appear in court while sleeping or if one did not even know about his scheduled appearance. The facts of a 1980 case gave the Supreme Court of the Commonwealth an opportunity to add depth to the definitional matrix. Justice Roberts wrote for the court that an

attorney who called and notified the court when he knew he would be late due to another court proceeding running longer than expected was not contemptuous for lack of intent. In the Matter of Mandell, 489 Pa. 522, at 526, 414 A.2d 1013 at 1015 (1980).

The last contempt reversal we shall refer to is Weingrad v. Lippy ___Pa.Super.___, 445 A.2d 1306 (1982). In that case, suggested points for charge were delivered to the trial judge 23 minutes late. While the judge had made it clear that he wanted the points delivered to him on time, the Superior Court found that the attorney had not acted with "wrongful intent" in that he had asked his secretary to come in an hour early to type the points. ___Pa. Super. ____at ____, 445 A.2d at 1308.

In contrast with these four reversed contempt orders is Commonwealth v. Marcone, 487 Pa. 572, 410 A.2d 759 (1980). In that case, an attorney, informed that opposing counsel would be late, waited for his arrival instead of going directly to court. By the time he

stopped waiting and got to court the proceeding was over. The attorney had been aware of the time and that he would be late arriving in court as a consequence of waiting for opposing counsel.

How can these cases be used in analyzing Orloski's actions for the presence, vel non, of intent? Rather than merely reciting, out of context, the legal rules or formulas stated in the cases, more guidance can be gained by looking to the factual calculus involved.

Orloski does not have the benefit of the exonerating circumstances present in the cases in which contempt orders were reversed. Unlike the appellant in the 1976 Washington case, he was both conscious and, at some points, aware of the time. He did not notify the court that he would be late, as did the attorney in the 1977 Washington case. There were no necessary time conflicts with other court proceedings as in the latter case or Mandell. (The case could have been stricken

at any later time in the day.) Nor is there evidence of a good faith effo-t to comply as was obvious in Weingrad -- at least not until after the harm was done and he was already late.

However, on the other side, Orloski also lacks the deliberate, conscious decision to be late that figured so significantly in the affirmance of Marcone's contempt order.[1]

As the above analysis demonstrates, prior case law is not dispositive in deciding the outcome of this appeal. The type of situation present here did not appear in those cases.

In making our decision here, we make note of two crucial moments in the chain of events leading up to Orloski's tardy arrival. The first occurred when he decided, immediately after 10:00 to 10:05, to go to the Court Administrator's office to strike a case. Considering his obligation to be in conference at 10:15, this was already "cutting it close."

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[1]Orloski, like Marcone, did miss the entire proceeding.

The second critical moment occurred when Orloski decided to wait for the Court Administrator's return. We cannot hold that at the moment he decided to wait that he also consciously intended to be late for the pretrial conference. Orloski denies any such intent, and, of course, this court cannot ascertain the specific subjective mental state of any person.

But such an admission or mind-reading is superfluous because Orloski can be held, as a matter of law, to have intended the natural consequences of his acts. The law of intentional torts and of most specific intent crimes is satisfied with such a method of proof. We hold that it is equally suitable here.

As previously stated, Orloski met another attorney just after 10:00 to 10:05 on the first floor. They proceeded to the fourth floor, spoke to a secretary and then waited for an Administrator's return. Even had an Administrator arrived immediately, it is

highly unlikely that Orloski could have transacted his business and gotten to the conference on time. At the moment he decided to wait for the Administrator, his resulting tardiness at the conference appears to have been substantially certain. At the very least, he acted with reckless disregard for such tardiness. Either such substantial certainty or such reckless disregard will suffice to establish the intent required for contempt. It is to be emphasized that there existed here a conscious, deliberate act which gave rise to a substantial certainty of the forbidden result; and, alternatively, that act evinced a reckless disregard for the likely and forbidden result.

Case law in this area does not directly support this conclusion. The question has simply not been treated heretofore. We hold that intent can be proved through either the substantial certainty or reckless disregard methods described herein. We adopt this standard because the consequences of not doing so are unsatisfactory. By not allowing intent

to be shown by the implicators of one's deliberate acts, legitimate interests of the courts to their dignity and efficient operation of their court calendar would have no protection.

Order affirmed.

SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

Marlene F. Lachman, Esq.
Prothonotary
Patrick Tassos
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468 City Hall
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February 18, 1983

Richard P. Abraham, Esquire
ABRAHAM, PRESSMAN & BAUER, P.C.
1530 Chestnut Street
Suite 412
Philadelphia, Pennsylvania 19102

RE: Peter J. Medve v. Kevin J. Walakovits
PETITION OF: Richard J. Orloski
No. 654 E.D. Allocatur Docket 1983

Dear Mr. Abraham:

This is to advise you that the following Order has been endorsed on the Petition for Allowance of Appeal, filed in the above captioned matter:

"February 17, 1983.

Petition Denied.

Per Curiam."

Very truly yours,

MARLENE F. LACHMAN, ESQUIRE
Prothonotary

By: /S/ Patrick Tassos
PATRICK TASSOS
Deputy Prothonotary

/mz
cc: William G. Ross, Esquire
Howland W. Abramson, Esquire
Honorable David E. Mellenberg